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IN THE

Supreme Court of the United States

October Term, 1923

No. 40

**THE UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, and
SWIFT LUMBER COMPANY,
Appellants**

vs.

**ILLINOIS CENTRAL RAILROAD COMPANY, and
FERNWOOD, COLUMBIA & GULF RAILROAD
COMPANY,
Appellees**

Appeal from the District Court of the United States for the Southern District of Mississippi.

BRIEF FOR SWIFT LUMBER COMPANY, Appellant.

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STATEMENT OF THE CASE

(References are to pages of printed Record, except as otherwise stated)

This action was instituted in the District Court of the United States for the Southern District of Mississippi, Jackson Division, by the Illinois Central Railroad Company and the Fernwood, Columbia & Gulf (formerly Fernwood &

Gulf) Railroad Company, against the United States (Record, pp. 1-17), seeking to enjoin an order of the Interstate Commerce Commission, rendered in cause No. 10,827 of the docket of said Commission, in which the Swift Lumber Company was complainant and the two carriers named and a large number of other common carriers were defendants. By said order, and the findings made a part of same, the Commission found that the rates published and maintained by the defendants on lumber, carloads, from Knoxo, Miss., a station on the rails of said Fernwood, Columbia & Gulf Railroad, were unjustly discriminatory as compared with rates contemporaneously applying from a large territory of origin immediately surrounding said station of Knoxo, to a large extent of destination territory, comprising in the main points on and north of the Ohio and Potomac Rivers, and points opposite thereto east and west, besides certain points in Tennessee and Kentucky. By its said order, the Interstate Commerce Commission required the numerous carriers defendants before it to cease and desist from such discrimination, and to establish and maintain, from and after the effective date of said order, which was postponed from time to time to September 27, 1921, rates not in excess of those contemporaneously maintained from Fernwood and Tylertown, Miss., the junction points of said Fernwood, Columbia & Gulf Railroad with the Illinois Central Railroad and the New Orleans Great Northern Railroad, respectively (Record, pp. 154-158).

The Interstate Commerce Commission and the Swift Lumber Company duly intervened in said cause in the Court below as defendants, and this appellant moved to dismiss the complaint (Record, pp. 166-167), which motion was overruled on August 18, 1921, by the Court, composed of three judges as provided by law, who at the same time, on motion of plaintiffs, granted a decree temporarily restrain-

ing the said order of the Commission during the pendency of the action (Record, pp. 167-168). The Swift Lumber Company filed its answer as intervenor November 16, 1921 (Record, pp. 170-178), and on February 10, 1922, the District Court, on final hearing, rendered a decree making such injunction perpetual (Record, p. 180). Thereupon, the United States, as original defendant, and the Interstate Commerce Commission and the Swift Lumber Company as intervenors, filed their joint petition for appeal to the Supreme Court (Record, p. 181), which was duly allowed by the judges presiding on the final hearing of said cause (Record, p. 183), and bring the cause to this Court for review upon their joint assignment of errors filed in the Court below, setting out that said Court erred in its findings and decree in the following respects (Record, pp. 181-182):

The District Court erred:

I. In granting the motion for preliminary injunction enjoining the order of the Interstate Commerce Commission entered April 5, 1921, and suspending the force and effect of the same, and in not denying the motion.

II. In overruling the motion of the United States to dismiss the petition and in not sustaining the motion.

III. In disallowing and overruling the motion of the Interstate Commerce Commission to dismiss the petition, and in not sustaining the motion.

IV. In dismissing the intervention of the Swift Lumber Company at the cost of the Company.

V. In entering the following order:

"It is hereby ordered, adjudged and decreed that the United States, its agents, employes and attorneys be, and they are hereby perpetually

enjoined and restrained from enforcing, or attempting to enforce, that certain order made by the Interstate Commerce Commission of the United States in that certain cause before said Commission lately pending, styled 'Swift Lumber Company vs. Fernwood, Columbia & Gulf Railroad Company et al.,' Number 10,827 upon its docket, wherein a final order was entered of date of April 5, 1921, whose effective date was from time to time postponed, and that all persons be, and they are hereby enjoined from in any way attempting to enforce or assert any right or title under said order of said Interstate Commerce Commission in said cause made, and that the same be hereby ordered and adjudged to be null and void and without any force or effect, and to that end perpetual injunction shall issue."

VI. In not finding and holding that the Interstate Commerce Commission on the record of the evidence and proceedings before it had the power and authority to make and enter the order; that the order rested on substantial evidence, and that the questions sought to be raised by the bill of complaint were foreclosed by the findings of fact.

VII. In not dissolving the preliminary injunction and dismissing the bill of complaint for want of equity on the final hearing.

Supplementing the foregoing formal outline of the proceedings and record in the Court below, this appellant, in order to avoid undue repetition, refers to and adopts, and asks to be consiered as a part hereof, the further particulars contained in the briefs of its co-appellants, the United States and the Interstate Commerce Commission; and it further refers to and asks to be considered as supplementary to and a part of this statement the several citations

of the record setting forth the proceedings in the Court below and before the Interstate Commerce Commission, appearing in the succeeding portions of this brief, bearing upon the various phases of the case therein discussed.

As the errors assigned, as above quoted, all go to the substantial question at issue, that the Interstate Commerce Commission, on the record of the evidence and proceedings before it, had the power and authority to make and enter the order; that the order rested on substantial evidence, and that the questions sought to be raised were foreclosed by the findings of fact, it is conceived that they may be considered as a whole, and to that end this appellant respectfully submits the following propositions as covering the material questions at issue in this appeal:

FIRST PROPOSITION

The order of the Interstate Commerce Commission was sufficiently supported by the evidence adduced before it and exhibits filed on the hearing of the case, and by the findings of fact made by the Commission in the just and proper exercise of its discretion, based upon such evidence and exhibits.

Manifestly, it is impracticable, within the limits of this brief, to review the findings of the Commission and point out in detail the evidence in the record supporting them; nor do we understand that this is necessary or desirable. It will be sufficient to point out the findings of fact made by the Commission, all of which are amply sustained by the evidence adduced at the hearing, and for practical purposes this may be done by quoting the following from the opinion rendered by the Commission, which appears on page 488 of volume 61 of the Commission's reports (Record, pp. 147-148):

"Practically all of the yellow-pine production on the Illinois Central and the affiliated Yazoo & Mississippi Valley is in the territory south of the line of the Alabama & Vicksburg, and from all points in this territory, both on their main lines and on their branch lines, the Illinois Central and Yazoo & Mississippi Valley blanket their rates on yellow-pine lumber and its products to Ohio River crossings and points taking the same rates; to the territory beyond the Ohio River crossings, including eastern and Virginia cities; and to points in Kentucky and Tennessee on their own lines and on the lines of certain other carriers. Points on the main line and branch lines of the New Orleans Great Northern are similarly blanketed.

"The Fernwood & Gulf is well within this blanket territory and nearer to the northern boundary line than to the southern. The distances from Knoxo to the destinations involved herein are substantially less than the distances to the same destinations from many shipping points having the blanket rates. For example, from Ponchatoula, La., a lumber-shipping point 49 miles north of New Orleans, on the main line of the Illinois Central, the distances are 26 miles greater than from Knoxo. The Illinois Central apparently has no branch lines in the blanketed territory except the short Monticello branch, but from Covington, La., the terminus of a branch of the Yazoo & Mississippi Valley connecting with the line of the former at Hammond, La., and with the main line of the latter at Baton Rouge, La., the distance to Memphis, Tenn., through which point most of the traffic with which we are concerned moves, are 115 miles greater by way of Baton Rouge and 44 miles greater via Hammond than the corresponding distance from Knoxo. From Woodville, Miss., also on a branch of the Yazoo & Mississippi Valley, the distances are 71 miles greater than from Knoxo. From Folsom, La., a point on a branch line of the

New Orleans Great Northern, the distances are 24 miles greater than from Knoxo by way of Tylertown and 96 miles greater by way of Foxworth. The points above named, from all of which yellow-pine lumber is shipped, are in the extreme southern part of the group and the distance comparisons are given merely to show that Knoxo is well within the blanketed territory."

There were minor factors of the situation, but outside of the existence of the rates in controversy, which are not questioned, the foregoing sums up the essential features of the rate adjustment under consideration by the Commission.

SECOND PROPOSITION.

Even if it be held that the rates complained of before the Commission, against which its order at issue herein was directed, were improperly held to be discriminatory as compared with those contemparaneously published and maintained from points on the Mississippi Central Railroad to the same destinations, the findings and order of the Commission were amply sustained by evidence of discrimination in other respects.

Complainants in the Court below, in paragraph XIX of their bill of complaint, allege that the only discrimination which is even suggested as ground for making the order complained of grows out of the fact that the Illinois Central extends the junction point rates to points on the Mississippi Central Railroad, and participating in through group rates from certain other small railroads named (Record, p. 14). That this conclusion is not borne out by the findings of the Commission appear from the fact that its opinion does not purport to base its conclusions pri-

marily, or even in part, upon the extension of the group rates to points on such roads, and mentions them only on page 487 of its opinion (Record, p. 147) in connection with the allegations and contentions of this intervenor as to such rates, and the contentions of the carriers in regard thereto, including the argument that plaintiffs below were compelled by competition to participate in such group rates from points on the Mississippi Central, and had no control over the rates from the other short line roads named. On the contrary, the issue as analyzed by the Commission, based upon the facts found by it, as recited under the first proposition, **supra**, is thus stated and commented upon in its opinion; page 490, (Record, p. 149):

> "The fundamental issue is whether carriers which have equalized rates on lumber to certain destinations from all their main-line and branch-line points, and from points on certain independent short lines as well, which are located within a producing territory of wide extent may, without being guilty of undue prejudice, refuse to extend similar blanket rates to producing points within such territory which are located on other indepentent short lines. No question is raised as to the propriety or desirability of the blanket already established, but on the contrary it seems to be conceded that it is of general advantage to producers, consumers and carriers alike. The sole question is whether defendants were and are justified in refusing to extend its benefits to these other short-line points and specifically in this case, to Knoxo, on the line of the Fernwood & Gulf."

It will be observed that the dominant factor of the situation as viewed by the Commission was the equalization of rates on lumber from points located within "a producing territory of wide extent," as described in its findings of fact above quoted. This analysis embodies features of dis-

crimination against this intervenor in the following respects:

1. Primarily and most important, the blanket rates ignored differences in the length of haul, and the consequent cost of service, to the extent of 200 miles or more, as compared with the assessment of an additional rate for the haul of 27 miles from Knoxo to Fernwood, and of seven miles from Knoxo to Tylertown.

2. The application of the blanket rate to branch line points ignored the addition to cost of service due to its interruption by transfer to the main line, which is closely comparable to the transfer from the Fernwood & Gulf to its connections, which is the only physical element of additional cost necessitated by a shipment from a point on the Fernwood & Gulf, as against one from a point on the Illinois Central or New Orleans Great Northern main line.

3. Extension by the Illinois Central of the group rates, not to the Mississippi Central alone, but to a number of other connections which originated the traffic, such as the Louisiana Railway & Navigation Company, the New Orleans Great Northern, and the Gulf & Ship Island, distinguishable from the Fernwood & Gulf only by their mileage and the amount of business they originate, an utterly defenseless test on which to predicate a distinction in rates. The wide extent to which the Illinois Central had extended the group rates beyond its own rails places the case on a different footing from that of one involving discrimination between two specific connections, and embodies in substance the same principle as the blanket adjustment itself. Supplemetary to this is:

4. Participation by the Illinois Central at junctions within producing territory in blanket rates from "short

line" points through the intervention of other carriers, e. g., from points on the Alabama & Mississippi and the Mississippi Western via the Gulf Mobile & Northern and Ackerman, Miss.

That all these points were considered by the Commission and decided adversely to the carriers in a manner clearly and properly within its discretion, is evidenced by the following further quotation of its opinion, on page 490, following that last above quoted (Record, p. 149-150):

> "Clearly cost of service furnishes no justification for such refusal, for the haul from Knoxo is shorter than the hauls from numerous other points to which the blanket rates apply, and there is no evidence that it is attended by unusual transportation difficulties. As compared with a single-line haul, some slight additional cost is doubtless involved in the separate corporate organization of the Fernwood & Gulf and in its separate billing and accounting expense, but the blanket rates are not now confined to single-line hauls, but apply in many instances to multiple-line routes. Nor will competition serve as a justification, for the blanket rates apply not only at junction points where competition exists, but as well at all local points on both the main lines and branch lines of defendants.

THIRD PROPOSITION

The findings and order of the Commission were justified on the sole ground of discrimination in comparison with rates contemporaneously maintained from points on the Mississippi Central Railroad, by reason of the fact that plaintiffs herein and other carriers participating in the rates complained of from Knoxo were refusing to give effect to the natural competitive conditions obtaining at

Knoxo, while at the same time giving effect to similar competitive conditions obtaining at points on the Mississippi Central; and the findings of the Commission are therefore justified notwithstanding a greater degree of competition existed from the latter points.

Under the first and second propositions above, it is evident that the real basis of the decision of the Commission was the widespread application of the group rates from the large territory immediately surrounding Knoxo, of which their application from points on the Mississippi Central was only a part, instead of being, as virtually contended by appellees, the sole ground of the decision. Whatever virtue there might be in the contention that a comparison with rates from Mississipi Central points alone being compelled by competition, and therefore not furnishing a lawful test, it certainly offers no objection to the consideration of such rates as a single factor going with many others to form a situation which on the whole resulted in undue discrimination.

In this view of the case the justification of the rates from the Mississippi Central on the ground of competition becomes immaterial, but in view of the emphasis laid upon the point by the complainants below, it is well to point out that even their contention on that point is not supported by the record. It must be borne in mind that the complaint before the Commission was not directed against the Fernwood & Gulf and its immediate connections only, but against a large number of other carriers, of whom it is sufficient for present purposes to mention only the Alabama & Vicksburg Railway Company, Mobile & Ohio Railroad Company, Missouri Pacific Railroad Company, Alabama Great Southern Railroad Company and New Orleans & Northeastern Railroad Company. As will be seen from

the map offered in evidence by complainant before the Commission as it Exhibit No. 4 (Original Record, p. 325), the Illinois Central on the west, and the New Orleans Great Northern on the east, connect with the parallel lines of the Fernwood, Columbia & Gulf and the Mississippi Central, the New Orleans Great Northern extending to Jackson, Miss., where it connects with the Alabama & Vicksburg, extending east to a connection with the Mobile & Ohio and Alabama Great Southern at Meridian, Miss., and west to a connection with the Missouri Pacific at Vicksburg, Miss., providing outlets to consuming markets independent of the Iillnois Central. It will therefore be observed that traffic from the Fernwood, Columbia & Gulf is essentially competitive as between the Illinois Central on the west and the New Orleans Great Northern and its connections on the east, and not to be distinguished from that originating on the Mississippi Central. It is respectfully submitted that an absolute justification in law for discrimination can be predicated only upon the existence of competition in the one case which is entirely lacking in the other. It is true that in the case of the Mississippi Central the competition is greater in degree, owing to the fact that that road has another connection with the New Orleans & Northeastern at Hattiesburg; but something more is required to remove the question from the discretion of the Commission. The starting point of this aspect of the case is the unquestioned existence of discrimination, and while the Commission might perhaps hold that it was justified by a greater degree of competition in one case than in the other, it is equally true that its opposite finding is a lawful exercise of its discretion, with which the courts will not interfere.

FOURTH PROPOSITION.

The record before the Commission does not support the contention of the Illinois Central Railroad that its extension of the group rates to points on the Mississippi Central was forced by the prior action of other carrier connecting with such railroad; but it does show that at the time it put such rates into effect it was pursuing the policy of exending such group rates to points on other so-called short lines similar to the Mississippi Central and Fernwood, Columbia & Gulf.

Practically the only justification offered by the appellees for their refusal to accord group rates to points on the Fernwood & Gulf, while extending them to points on the Mississippi Central, is that they were forced to extend such rates to the latter road by the prior action of the New Orleans & Northeastern. (Testimony of Sheppard, Record p.p. 82-83). Apparently the impression is sought to be conveyed that they would otherwise have made rates from that road on an arbitrary basis, although it, like the Fernwood, Columbia & Gulf, is controlled by lumber interests, and as shown an page 16 of the evidence before the Commission, (Record, p.p. 41-42), these interests have mills located at local points. It is conceived that in view of the present situation of discrimination arising from recognizing competition in one case and ignoring it in the other, neither the Commission nor the courts are called upon to revert to ancient history to determine the responsibility for extending the group rates to the Mississippi Central, and whether it was voluntary or compelled on the part of the appellees. It is true the original connection of the Mississippi Central was with the New Orleans, but this lacks much of meaning compulsion, of the kind amounting to justification, and to hold it so would

mean entering the realm of speculation to find an excuse for voiding the Commission's order. As a matter of fact, it appears from the record before the Commission that at the time connection was made between the Illinois Central, and the Mississippi Central the former road was following the practice common in those days of extending special concessions to sawmill owners of small railroads. As shown by Exhibit No. 6, offered by this intervenor at the hearing before the Commission"s examiner, (Record, p. p. 45-46), the Illinois Central was at that time applying the group rates on lumber from Fernwood, applicable only on lumber manufactured from logs brought into Fernwood from stations on the Fernwood & Gulf road, including the transportation of the logs to Fernwood, for which the Fernwod & Gulf was allowed a division out of the Fernwood rate. Under these circumstances, to place the sole responsibility for the Mississippi Central adjustment on the New Orleans & Northeastern would be a most violent presumption, and the past history of the rates only tends to emphasize the correctness of the Commission's findings on the true issue, so far as this aspect is concerned, which as stated under the third proposition above, was whether, considered as of the present, the difference in treatment of the two roads was justified by mere difference in degree of competition.

FIFTH PROPOSITION.

The findings and order of the Commission do not violate any inherent right in the Fernwood, Columbia & Gulf Railroad to maintain such basis of rates on lumber from its local points as it may deem proper, and the finding of discrimination on the part of its connections participated in by it, is justified by the practical aspect of the question, which is that the extension of group rates to short line rail-

roads is within the discretion and control of the trunk line carriers, rather than that of the short line road itself. In sections XV and XXII of their bill of complaint, appellees assign as basis of their attack upon the order of the Commission in controversy herein, the fact that the traffic in question is not accessible to any other rails than those of the Fernwood Company; and there is much said in the bill of the alleged right of that carrier to the individualization of its own rates. As understood, this is in effect a contention that the finding of discrimination by the Commission was unwarranted because the act of discrimination could not be brought home to the Fernwood, Columbia & Gulf Railroad because it did not participate in the rates in comparison with which the discrimination was found to exist, and virtually the volume of the rate from its stations was a matter properly coming within its own individual discretion.

It is respectfully submitted that the latter contention constitutes an unwarranted arrogation of power to the originating line, and that in spite of the various protests in the bill of complaint against the alleged effort of the Commission to co-ordinate its rates with those from points on other roads in the same territory, the right of independent action by the individual carrier is subordinate to the right of the public to a well ordered and consistent rate adjustment in harmony with the general basis of rates in effect in the adjacent territory subject to the same conditions, and to the power of the Commission to require such an adjustment. It is difficult to perceive the sacredness of a policy of "individualization" which contemplates that shippers on its line shall be placed at a material rate disadvantage as compared with their competitors entirely surrounding them in a large territory, which is exactly what this claimed "individual policy," stripped of all its

beclouding verbiage, really means; and especially is this true when it is considered that the shipper here in question is a competitor of the lumber interests which control the originating road.

Further, however, it is submitted that the Fernwood, Columbia & Gulf is not the sole arbiter of the rate structure which shall obtain on traffic originated by it. There is no dividing line between its claimed right to plus the rates from its line and the right to dictate the entire through rate, which is manifestly the act of all the carriers participating therein, all of whom were made parties before the Commission, although for present purposes we need only consider those heretofore mentioned. Not merely the fixing of the through rate, but the fixing of the relation of the rate with those from other points in the group can be considered in no other way than as the joint act of the originating road and its connections; and if the theory of the appellees be conceded it means that the Commission is without power, merely because the short line originating road happens to be a different one in every case, to require any consistency between rates in immediately contiguous territory. The question is purely a practical one for the Commission, and the view of the latter regarding it is clearly indicated by the expressions used in its opinion as above quoted, i. e.,

> "The fundamental issue is whether carriers which **have equalized rates** on lumber to certain destination from all their main-line and branch-line points, **and from points on certain independent short lines** as well, may, without being guilty of undue prejudice refuse to **extend** similar blanket rates to producing points wtihin such territory which are located on other independent short lines."

The use of the word "extend" is significant, and conveys the Commission's recognition of the well-known traffic principle that the application of group rates from short line originating roads is a matter primarily for determination by their trunk line connections, rather than by the short line roads themselves. Certainly the Illinois Central, for example, can not escape the charge of discrimination until it has gone as far to establish group rates on the Fernwood, Columbia & Gulf as it has to establish them on the Mississippi Central, i. e., by allowing it a division of 6 cents per 100 pounds (Record 117), and certainly it is not to be assumed that the Fernwood, Columbia & Gulf would insist upon its "policy of individualization" in such an event. The Commission has reached the real heart of the matter by finding that the connections of the Fernwood, Columbia & Gulf have subjected the complainant before it to undue prejudice, which is a substantial thing, while the theory that it is estopped from condemning this prejudice merely because the Fernwood, Columbia & Gulf is not a party to the rates with which its own are compared is but a shadowy thing, and the order to remove the discrimination properly runs against it by reason of its acquiescence in the discrimination.

SIXTH PROPOSITION.

The contention of the Fernwood, Columbia & Gulf Railroad that the rates prescribed by the Commission in its order are unremunerative is not supported by the evidence before the Commission, and it has wholly failed, both before the Commission and in the Court below, to adduce the necessary evidence to establish this fact, and to sustain its claimed right to a return which will provide for a retirement reserve to amortize its investment.

Whatever merit there may be in this contention of the appellees, it is respectfully submitted that it is one as to which the burden of proof is upon them, and they have entirely failed to meet it. In this connection the peculiar situation of the Fernwood & Gulf road must be considered, it appearing from the record before the Commission that it was originally built as the logging railroad of the Fernwood Lumber Company, and (Record, page 124) 85 per cent of its present traffic consists of the log movement of that company. In the entire absence of any evidence, either before the Commission or before the court below, of the charges fixed by the closely connected owners of the railroad and the lumber company to be paid by the latter for the transportation of its logs, or of the amortization charged off by the lumber company in fixing the consideration to be paid by the railroad company on acquiring ownership of the road, any finding by this Court that the rate prescribed by the Commission would be confiscatory must necessarily be based upon mere presumption, and a totally unwarranted substitution of the opinion of the Court for that of the Commission.

As far as the Fernwood & Gulf is concerned the Commission in its opinion, (Record, p. 148), points out that its opinion in the Tap Line case justifies an allowance of 5 cents per 100 pounds to it, which is more than it is receiving, and notwithstanding the broad general statement of the witness Sheppard (Record p. 110), that his road could not afford to allow a greater shrinkage, we submit that the record is absolutely barren of any evidence on this score that would even remotely call for setting aside the findings made by the Commission.

SEVENTH PROPOSITION.

Complainant before the Commission was not estopped by contract from objecting to the rates there complained of.

The emphasis laid upon the theory that the Swift Lumber Company was estopped by contract from maintaining its complaint before the Commission seems to call for some notice of the point here, extraordinary as it may seem from a legal standpoint. It is not our purpose, however to call to attention the obvious fallacy of the contention that either the shipper or the carrier may be bound by a permanent agreement as to rates, but we shall content ourselves with referring to the purported contract itself. This contention has reference to Exhibit No. 8 identified at the hearing by the witness Kimball (Record p. 56), which was a contract whereby the Swift Lumber Company acquired a right of way for its logging railroad over the lands of the Fernwood Lumber Company. We invite the court to carefully scrutinize this contract, (orginal Record, p. 331), and confidently challenge appellees to point out that it anywhere purports to obligate the Swift Lumber Company to pay for the transporation of the lumber manufactured by it any particular rates or basis of rates, or even mentions the shipment of such lumber at all. All that it does provide, relating in any way to traffic, is that the Swift Lumber Company shall deliver to the Fernwood & Gulf road for transportation any goods offered to it by third persons destined to points beyond it own line. In other words, it contemplates that the Swift logging road may develop a certain amount of general traffic incident to its primary function of hauling logs; and while the provision was in fact superfluous, inasmuch as it reached no other rails than those of the Fernwood & Gulf, it was apparently de-

signed to secure the traffic to the latter road in case the logging road were at some future time extended to a connection with another railroad.

ARGUMENT.

The Swift Lumber Company conceives that, considering its status as intervenor, it may appropriately direct its discussion of the case more particularly to the facts involved than to any extended analysis of the law applicable thereto. Hence, while some reference to decided cases is necessary to explain our conception of the materiality of the facts shown by the record, apparently our purpose may be best served by treating the former in a broad way and without going into any great detail.

The legal status of orders of the Interstate Commerce Commission under the interstate commerce act, especially as amended by the Hepburn act of 1906, is too well established to need any extended comment, but as a premise to this argument, we may cite one analysis of it by this Court, as embodied in the case of **Interstate Commission vs. Illinois Central R. R. Co.**, 215 U. S. 452, decided in 1919, in which after calling attention to the greater effect given to the Commission's orders by the amendment of 1906, it is said, on pages 469 **et seq**:

> "Beyond controversy in determining whether an order of the commission shall be suspended or set aside, we must consider (a) all relevant questions of constitutional power or law, (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made, and (c), a proposition which we state independently, although in its essence it may be contained in the previous one, viz., whether, even although the order be in form

> within the delegated power, nevertheless it must be treated as not embraced therein because the exertion of authority thus questioned has been manifested in such an unreasanable manner as to cause it in truth to be within the elementary rule that the substance and not the shadow determines the validity of the exercise of the power. (Postal Telegraph Co. vs. Adams, 155 U. S. 688, 698). Plain as it is that the powers just stated are of the essence of judicial authority, and which therefore may not be curtailed and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order under our suspicion as to whether the administrative power has been wisely exercised."

To substantially the same effect are the pronouncements of this Court in the following cases:

Illinois Central R. R. Co. vs. Interstate Commerce Commission, 206 U. S. 441.

Proctor & Gamble Co. vs. United States, 225 U. S. 282, 296.

Interstate Commerce Commission vs. Louisville & Nashville R. R. Co., 227 U. S. 88, 91.

Manufacturers' R'y vs. United States, 246 U. S. 457, 481, wherein the Court said regarding discrimination:

> "Whether a preference or advantage or discrimination is undue or unreasonable or unjust is one of these questions of fact that have been confided by congress to the judgment and discrimination of the Commission. **I. C. C. vs. Ala Mid. R'y, 168 U. S. 144, 168, 170;** and upon which its decisions made

> the basis of administrative orders operating in futuro are not to be disturbed by the courts, except upon a showing that they are unsupported by the evidence, are made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power."

Under our first proposition above, we have analyzed the essential facts disclosed by the record before the Interstate Commerce Commission, and found by it, sufficiently, we believe, to show that the issues before the Commission, and decided by it, were well within the scope of its power, and its findings and conclusions thereon were amply supported by the evidence adduced before it. Any addition to this analysis, short of a review of the entire record, seems superfluous at this point, and we shall content ourselves by referring to such analysis and inviting the careful scrutiny by the Court of the entire record before the Commission, which we confidently submit will disclose no foundation whatever in the substantial and broad aspects of the case for the attacks made upon it, especially in subdivisions 3, 7 and 8 of paragraph IV of the bill of complaint herein.

It follows that the issue herein turns upon the specific grounds alleged against the Commission's order in the bill of complaint, of which apparently that most relied upon and most strongly urged is that there was no evidence to support the finding of discrimination, and particularly in this connection that such apparent discrimination as existed was that appearing from a comparison with other rates, which were compelled by competition, as set forth in paragraph XIX of the bill of complaint. An examination of this paragraph discloses that it is an effort to justify the difference in rates solely from the standpoint of the two

complainants, and ignores the true status of the question as set out under the second proposition above. These two carriers were not the only defendants before the Commission, this intervenor's complaint being directed against numerous other carriers, particularly those within the orginating territory described; who had established the system of rates on lumber therein described, uniform so far as points of origin are concerned, the existence of which, as shown by the quotation above from the Commission's opinion, formed the principal basis for the finding of discrimination. It need not be inquired how this uniform system of rates was established, and while perhaps it was not the result of specific agreement, the uniformity itself argues that it necessarily grew out of an understanding reached in some way, as the great majority of such rate adjustments properly and necessarily do. The opinion of the Commission leaves no room for doubt that it is primarily upon the existence of this uniform, or "blanket" adjustment that it has reached its conclusions as to the duty of such carriers to this intervenor, located upon a small railroad within the blanket. The property of this action and the power of the Commission to make this finding is clearly stated in the case of **St. Louis Southwestern R'y Co. vs. United States**, 245 U. S. 136, 144, where it is said:

> "Localities require protection as much from combinations of connecting carriers as from single carriers whose rails reach them. Clearly the power of Congress and of the Commission to prevent interstate carriers from practicing discrimination against a particular locality is not confined to those whose rails enter it."

From this point of view it is plain that the question whether the unquestioned discrimination against this in-

tervenor and its shipping point, Knoxo, was undue, was clearly within the discretion of the Commission, whose finding thereon was amply supported by the evidence, and so far from being subject to review, it is difficult to see how it could have found otherwise, especially in view of the fact that this blanket adjustment involved numerous cases of the participation of an originating line prior to the trunk line which transported the lumber out of the producing region, and the further fact that Knoxo is itself naturally competitive. And this is true not only considering all the defendant carriers in the producing region together, but even as to the Illinois Central considered alone, whose sole justification of its treatment of rates from local points on the Fernwood, Columbia & Gulf is based upon its so-called consistent policy of confining the group rates to points on its own line, except where compelled by competition to do otherwise. It is true this Court has held that compelling competition may excuse discrimination, but on the other hand it is not all competition which may serve as such a valid excuse, and its force is peculiarly a question for the Commission, in view of all the facts. **Interstate Commerce Commission vs. Alabama Midland Ry.** 168 U. S. 144, 167.

As concerns the Illinois Central, a significant circumstance appearing from the record is the status of its so-called "consistent policy" of limiting the group rates. Whatever merit there may be in this contention as regards justifying an exception to such a policy on the ground of competition it is conceived that there is a limit at which it loses its force, and this limit has long since been passed in respect of the rates in question. As appears from the record, the Illinois Central has extended the group rates beyond its own line, and applies them from mills on the New Orleans Great Northern, Louisi-

ana Railway & Navigation Company, Gulf, Mobile & Northern, Gulf & Ship Island, Mississippi & Western, Alabama & Mississippi and Mississippi Eastern, embracing a total of 190 sawmills not reached by its own rails, as compared with 89 mills on its own lines, including the Yazoo & Mississippi Valley, and a bare three or four on its short line connections taking arbitraries higher. (See Exhibit No. 5, Record, p. 44, and original Record, p. ?—not indexed.) In other words, while in the beginning extension of the group rates beyond its own line might have been justified as an exception to its policy, on the ground of competition, the exception has now become the rule, and the original rule has become the exception. Certainly under these circumstances the presumption that the resulting discrimination against intrvenor is undue attaches with much greater force and calls for materially more convincing justification than is to be found in a "consistent policy" which has dwindled down to such an insignificant remnant.

It must be plain from the foregoing, and from the record, that this case presents a question of discrimination whose justification or condemnation was entirely within the discretion of the Commission, fully "within its delegated power," and wholly free from any possible criticism that its authority has been exerted "in such an unreasonable manner as to cause it in truth to be within the elementary rule that the substance and not the shadow determines the validity of the exercise of the power." It is true this Court has condemned certain orders of the Commission on the ground that it has misconceived what properly constitutes discrimination, or what competition or other consideration justifies it; but these decisions have been based upon practical questions calling for the exercise of judicial power and the application of legal princi-

ples thereto, and we confidently assert that none of them afford a reasonable ground for criticizing the conclusions reached in this case. In support of this contention it may be proper to briefly review a few of the principal decisions of this kind rendered by this Court, and contrast them with the questions in the present case:

In the case of **East Tennessee, Virginia & Georgia R. R. Co. vs. Interstate Commerce Commission, 181 U. S. 1,** this Court held that the defendant carriers were justified by competition of carriers operating through Cincinnati in maintaing lower rates to Nashville than to the intermediate station of Chattanooga, basing this conclusion on the practical consideration that the competition through Cincinnati was compelling, and created the disadvantage against Chattanooga, irrespective of whether or not the defendants met the competition at Nashville. In this, however, the Court followed specific findings of the Commission, and the principal point decided was that the Commission erred in holding that the discrimination against Chattanooga was not, as a matter of law, justified by any competition of carriers subject to the act to regulate commerce, and in therefore declining to base its conclusions upon the facts found by it. In comparison with the case at bar it is pertinent to point out that the case cited involved a conflict between two independent systems of rates, one called the Northern adjustment, and one the Southern adjustment, which met at Nashville, resulting in a disparity. In the present case we are dealing with a single rate adjustment, and the issue is whether an exception to it is justified; and while the question of competition enters more or less into both cases, the significance of such competition depends upon entirely different considerations, as is plainly manifest from the Commission's

analysis of the fundamental issue in this case, quoted under our second proposition.

The question decided in **Interstate Commerce Commission vs. Alabama Midland R'y, 168 U. S. 144,** was practically the same as in the case last cited, i. e., that the Commission erred in holding that competition could not be considered as justification for discrimination in the absence of prior application for relief from the fourth section, prior to the 1910 ammendment of the fourth section; while in **Texas & Pacific R'y vs. Interstate Commerce Commission, 162 U. S. 197,** a similar holding by the Commission as to the distinction between import and domestic traffic was condemned. In both these cases, however, the power of the Commission to review the act of the carriers in giving effect to these considerations in their tariffs is distinctly upheld.

In **Interstate Commerce Commission vs. Diffenbaugh,** 222 U. S. 42, it was held that the Chicago, Burlington & Quincy Railroad did not unduly discriminate against Mississippi river points by refusing elevator allowances on grain at such points, while making them at Missouri river points in competition with the Union Pacific, which made the allowances nowhere else. While this is clear as to the principle that competition may justify discrimination, its application to the very simple facts involved furnishes no argument whatever for questioning the correctness of the Commission's findings on a state of facts so materially different as in the present case. Indeed, all the elements on which the Commission based its conclusions in this case are conspicuously lacking in the case mentioned.

The case of **Philadelphia & Reading R'y vs. United States, 240 U. S. 334,** is even less persuasive, and apart from the mere fact that it condemns the Commission's

finding of discrimination, has no apparent bearing on the case before the Court. It merely holds that Jersey City, against which discrimination was not alleged, was not discriminated against, as held by the Commission, merely because rates thereto from Evansville and other producing points were not the same on cement, while uniform rates applied from Evansville and competing producing points to other destinations. In that case the Commission declined to find that rates from Evansville to Jersey City were unreasonable, or discriminatory as compared with rates from other producing points to Jersey City or from Evansville to other destinations; and this Court virtually held that the rates having been justified by the Commission in such respects, could not properly be condemned on the grounds assigned.

In **Central R. R. of New Jersey vs. United States, 257 U. S., 247,** this Court condemned a finding of discrimination by the Commission against appellant in a manner which likewise has no bearing whatever in the instant case. Briefly stated, it was held that the Commission erred in holding that the Central of New Jersey was guilty of discrimination in not according creosoting in transit privileges on lumber at points on its rails, while participating in through rates on lumber which had been granted such privilege by Southern carriers. It is pertinent to point out the distinction that so far from the issue herein being one of the act of one carrier as compared with another, all the defendant carriers bear the same relation toward the rates complained of as to those in comparison with which discrimination was found, and there is an utter lack of analogy between the circumstances of the two cases. The Court in the case cited bases its decision on the very practical view that the Central of New Jersey had no control what-

ever over the granting of the transit privilege by its prior connections, had no possible interest in it, and was not affected by it in any way, the matter being entirely within the control of the carrier on whose line it was granted, which carrier assumed all the expense and collected the charge therefor. In its proper meaning, this view only confirms the point made above, that the present case is logically to be judged in its practical aspects, which we have endeavored herein to analyze, and which the Commission has duly found in the legitimate exercise of its discretion.

In the four cases last cited it is evident that the Court considered the authority of the Commission to have been exerted "in such an unreasonable manner as to cause it in truth to be within the elementary rule that the substance and not the shadow determines the validity of the exercise of the power," but we feel convinced that the findings of the Commission in the case before the Court can not be questioned on that ground. There is certainly nothing shadowy or vague about the appellants having "equalized rates on lumber to certain destinations from all their main-line and branch-line points as well, which are located within a producing territory of wide extent," involving hauls longer and more expensive than from Knoxo, and involving numerous instances of the participation of prior carriers, nor in the resulting disadvantage to Knoxo. The conclusion is inevitable that the wide extension of the group rates to points not on the trunk lines reaching to destination territory, and the ignoring of potential competition at Knoxo, present a decidedly substantial question as to justification on the ground of competition. The only shadowy feature of the case visible to us is the contention of appellants, which reduced to its lowest terms amounts to the tenuous syllogism that discrimination may

be justified by competition, and rates from the Mississippi Central have been forced by competition.

We submit with confidence that the record before the Court affords no ground for condemning the order of the Commission, except by "setting aside a lawful administrative order under our suspicion as to whether the administrative power has been wisely exercised," which the Court will not do, as said in **Illinois Central R. R. vs. United States, supra.** On the contrary we can but feel that the Court will be impressed with the wisdom of the Commission's findings as a whole, even though some of the numerous considerations involved may not meet with its entire approval. **Interstate Commerce Commission vs. Louisville & Nashville Railroad, 227 U. S. 88.** The case just cited and those mentioned immediately below are cases involving discrimination in which the decision of the Commission was approved by this Court, and the facts involved present a similarity to those of the one at bar calling much more persuasively for a similar approval of its decision herein than any possible analogy to be deduced from those in which its decisions have been condemned call for the opposite conclusion. In the case of **Cincinnati, New Orleans & Texas Pacific R. R. vs. Interstate Commerce Commission, 245 U. S. 136,** this Court held that whether competition at Augusta, Ga., justified the charging of a lower rate to that point than to Social Circle, an intermediate point, was peculiarly within the province of the Commission, and upheld its order to require no higher rate to Social Circle; and although appearing in connection with another state of facts, that is in substance the exact issue presented here.

In **St. Louis Southwestern R'y vs. United States, 245 U. S. 136,** heretofore cited, the issues present an analogy to

the present case, in that they involved discrimination against points not reached by the appellee's rails, and the Court upheld the Commission's finding of undue discrimination as a proper exercise of its discretion.

In **Manufacturers' R'y vs. United States, 246 U. S. 457,** the analogous question of discrimination in the absorption of switching charges of local terminal roads was involved; and while this Court emphasized the power of the Courts to review the findings of the Commission according to proper legal tests, it held no less decidedly that the issues presented were properly for the judgment of the Commission, whose findings should not be disturbed.

The contention in appellees' bill of complaint that the decision of the Commission herein indicates a design to impose a uniform system of rates on all railroads in the South, which should be checked by the courts, we conceive, calls for but brief notice. Virtually this simply means that the present decision will become a precedent for like findings in future cases, which perhaps is true; but if this be a valid objection it is one which would not only apply to all decisions of the Commission, but those of the courts as well. In answer to the implication of dire calamity apprehended from elimination of the policy of plussing junction point rates from short lines, we might, were it in order, assign some strong reasons why it would be the best thing that could happen, not only for the shipping public, but for the carriers themselves; but manifestly there is no such issue before the Court. It is sufficient to say that even such a final outcome is not beyond the power of the Commission, and if its future decisions tend in that direction, without proper foundation, the carriers will have the full benefit of the protection afforded them by the law in the power of review vested in the courts. As a matter

of fact, such matter can only be considered as entirely speculative and unsubstantial, since the entire record contains not the remotest intimation of any general policy had in mind, and a careful examination of the record will disclose that the Commission's findings are based entirely upon the facts developed in and applicable to the present case alone, and constitute a precedent for future cases only so far as they present the same state of facts.

Incidentally, attention may be called to the fact appearing from the record (p.p. 190-193) that this question was called to the attention of the Commission and considered by it on motion for rehearing; and its dismissal of such motion may logically be taken as a disclaimer of any such formulated policy. In this connection it is to be noted that such motion for rehearing was passed upon by a full Commission, with the entire record before it, which of itself is a sufficient answer to the criticism of the circumstances under which the decision was rendered, embodied in section IX of the bill of complaint. (Record, p. 6.)

The questions raised in the bill of complaint relating specially to the Fernwood, Columbia & Gulf Railroad Company, appellee, have been analyzed under our fifth, sixth and seventh propositions, and this analysis will serve largely as argument, and need only be referred to here to avoid repetition. It is desired, however, in addition to what we have said under our sixth proposition as to the claim of unremunerativeness on the part of that carrier, to refer to the case of **Manufacturers' R'y vs. United States, supra,** wherein this Court said, page 490:

> "Certainly, where the Commission, after full hearing, has set aside a given rate on the ground that it is unreasonably high it should require a clear case to justify a court, upon evidence newly ad-

> duced, but not in a proper sense newly discovered, in annulling the action of the Commission upon the ground that the same rate is so unreasonably low as to deprive the carrier of its constitutional right of compensation."

We have commented above on the paucity of proof on the hearing to enable the Commission to properly find that the putting into effect of the rates prescribed from Knoxo would deprive either of the appellees of their right to compensation, or even that the revenue of the Fernwood, Columbia & Gulf would necessarily be in any manner reduced. Not only has the enlarged burden of proof described in the above quotation been unmet, but no attempt has been made in the Court below to add to the record on this point before the Commission; and there is therefore no basis upon which this Court can disturb its findings thereon.

We have under our propositions referred to and commented on the attitude of the Fernwood, Columbia & Gulf as to the features of individual rate policy and participation in discrimination, and feel that the considerations therein pointed out are a sufficient answer to the contention of appellees in such respects. In addition, however, to the fact that this vague and unsubstantially technical contention is sufficiently answered by the findings of the Commission as to the practical aspect of the case, such contention must fail for another reason, which has reference to the fundamental issue in the case as found by the Commission. As already pointed out the real and substantial foundation of the Commission's finding of undue discrimination consists of the maintenance of uniform rates from a producing territory of wide extent; and it is important to note that this uniform basis is protected by the

Fernwood, Columbia & Gulf via its eastern junctions, and from Tylertown (and we venture to add from Foxworth and Columbia also, although this development occurred in time to be only hinted at in the record of evidence) via Fernwood. (Complainant's Exhibt 1, Original Record, p. 173.) It thus appears that the Fernwood, Columbia & Gulf is an active participant in the maintenance of the uniform group basis of rates, in comparison with which discrimination was found by the Commission, and is in no position to claim, as it does, that it has no such part therein as to make it chargeable with discrimination. Neither, for the same reason, can it maintain its plea of the unremunerative character of the rates prescribed by the Commission.

For the reasons above assigned, it is respectfully insisted that the judgment of the Court below should be reversed, and the cause remanded with instructions to dismiss the bill of complaint.

Respectfully submitted,

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L. PALMER,